

N.D.A.G. Letter to Jones (Nov. 28, 1989)

November 28, 1989

Mr. Lloyd A. Jones
Commissioner
North Dakota Game & Fish
Department
100 North Bismarck Expressway
Bismarck, ND 58501-5095

Dear Mr. Jones:

Thank you for your letter of October 25, 1989. You inquired whether N.D.C.C. § 28-32-02 requires the state Game and Fish Department to publish a notice of proposed rule making twice in each of North Dakota's ten daily newspapers, if a state subdivision applied to the department under N.D.C.C. § 20.1-13-12 for special rules regarding specific bodies of water in their jurisdiction.

If the particular property or facility to which a specific rule would refer is owned, operated, or maintained by the state or a subdivision of the state, the answer to your question is no. However, if the rule has general applicability to more than a particular facility or property, compliance with the provisions of N.D.C.C. § 28-32-02, including the requirement for publishing notice of the proposed rule twice in all ten daily newspapers, is required for the rule to be valid and enforceable.

The statute you quoted from regarding publication (N.D.C.C. § 28-32-02) applies only to the proposed adoption, amendment, or repeal of a rule. "Rule" is defined in section 28-32-01(6). That section provides:

"Rule" means the whole of a part of an agency statement of general applicability that implements, interprets, or prescribes law or policy, or the organization, procedure, or practice requirements of the agency. . . . The term does not include:

. . . .

- e. A rule relating only to the use of a particular facility or property owned, operated, or maintained by the state or any of its subdivisions, if the substance of the rule is adequately indicated by means of signs or signals to persons who use the facility or property.

In the situations you describe, including setting horsepower limits or designating some lakes as "no motor" lakes, those restrictions would not be a "rule" as defined in N.D.C.C. § 28-32-01(6). Any restriction of that sort would not be an "agency statement of general applicability," and would specifically be exempted from the definition of "rule" by

subsection (6)(e), because it would relate only to the use of a particular facility or property.

N.D.C.C. § 20.1-13-12 authorizes subdivisions to apply to the state Game & Fish Department for special rules and regulations with reference to the operation of vessels on any waters within their territorial limits. It also authorizes the state Game and Fish Department to make special rules with reference to the operation of vessels on waters in the subdivision's territorial limits.

It is my opinion that public notice for promulgating a special rule relating only to the use of a particular facility or property owned, operated, or maintained by the state or a subdivision of the state need only meet the requirements of N.D.C.C. § 20.1-13-12 provided the substance of the rule is adequately indicated to persons who use the property or facility, by means of signs or signals.

I hope this discussion has been helpful to you.

Sincerely,

Nicholas J. Spaeth

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